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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-922

WILLIAM CLYDE BROWN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

and

HILL EUGENE JONES,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

---

W. H. McELWEE

JOHN E. HALL

Attorneys for the Petitioners
906 B Street Rear
North Wilkesboro, N.C. 28659

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The petitioners, WILLIAM CLYDE BROWN and HILL EUGENE JONES, pray that a writ of certiorari issue to the

United States Court of Appeals for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix I) is not yet reported.

JURISDICTION

The Judgments of the Court of Appeals for the Fourth Circuit sought to be reviewed were entered by that Court on the 16th day of November, 1973. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Does the case of *Hester vs. United States, 265 U S 57, 44 S Ct 445, 68 L Ed 898,* permit a Federal officer to trespass upon one's curtilage to garner evidence with which to obtain probable cause for the issuance of a Federal search warrant?

2. Where a Federal officer trespasses upon one's curtilage (Constitutionally protected area) and thereby obtains probable cause evidence with which to obtain a Federal search warrant to search said curtilage (Constitutionally protected area), do the acts of the Federal officer constitute a warrantless search of said curtilage (Constitutionally protected area) within itself?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Amendment Four to the Constitution of the United States.

B. 26 U.S.C. Sections 5173, 5601, 5222, 5205, and 5604.

STATEMENT OF THE CASE

The petitioners were charged in a bill of indictment with carrying on the business of distillers, making and fermenting pomace or mash fit for distillation at an unlawful place and the possession of untaxpaid distilled spirits. Prior to the cases coming on for trial in the District Court for the Middle District of North Carolina, each of the petitioners, in apt time, filed motions to suppress the evidence on the ground that the evidence secured by the Government agents was repugnant to the Fourth Amendment to the Constitution of the United States. Each of the motions was denied by the District Court. Timely notices of appeal to the Court of Appeals for the Fourth Circuit were filed by each of the petitioners in apt time, and each of the petitioners was admitted to bail.

The facts and circumstances for the procurement of the evidence by the United States through its Alcohol, Tobacco and Firearms officers and upon which the United States relies for the legality of the search and seizure are as follows:

> The ATF officers trespassed upon the curtilage of each of the petitioners in order to detect by way of sight and smell the facts as set forth in their affidavits for the issuance of a search warrant to search a barn on the premises of each of the petitioners. The ATF officers had no warrant to go upon the curtilage of either of the petitioners. In each instance, ATF agents entered the curtilage of the petitioners and walked within a very short distance of each of the barns, smelled the odor of fermented mash, and in the Brown case, saw wires or hoses extending from the barn outside and on the ground.

FEDERAL JURISDICTION

This was a criminal proceeding instituted by the United States of America upon indictment charging each of the petitioners with violation of criminal statutes under the Internal Revenue Code of 1954. This was the basis for federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in the case of each of these petitioners is in conflict with applicable decisions of the Supreme Court of the United States and specifically in conflict with the following decisions:

A. McDonald v. United States, 335 U.S. 451 (1948);

B. Hester v. United States, 265 U.S. 57, 44 S Ct 445, 68 L Ed 898;

C. Katz v. United States, 389 U.S. 347, 88 S Ct 507, 19 L Ed 2d 276;

D. Jones v. United States, 357 U.S. 493 (1958).

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the several Courts of Appeal of the United States as follows:

A. Wattenburg v. United States, 9 Cir 388 F 2d 853 (1968);

B. Texas v. Gonzales, 5 Cir 388 F 2d 145 (1968).

The Court of Appeals, in this case, held as a matter of law that the barns of the petitioners were within a Constitutionally protected area or comprised the curtilage of the petitioners. The ATF agents went to within a short distance of the barns in order to obtain probable cause evidence to submit to the United States Magistrate for the issuance of a search warrant and returned to the same place and searched and seized the articles objected to.

The so-called "Open Fields Doctrine" as was announced in *Hester vs. United States, supra*, has no relation to the present-day notion of the interpretation of the Fourth Amendment to the Constitution and particularly in this case for the reason that the ATF officers, in order to obtain probable cause, went to the very place they sought to search and did ultimately search and in the first instance had no

warrant of any description.

In *Katz v. United States, supra,* the Supreme Court held that the placing of a transcriber in a public telephone booth was an unconstitutional intrusion and was prohibited by the Fourth Amendment. The Court held in that case that what a person seeks to preserve as private is Constitutionally protected.

In *McDonald v. United States, supra,* the Court held that peering into a window to obtain probable cause was a search within itself and was Constitutionally prohibited by the Fourth Amendment.

In *Wattenburg v. United States, supra,* and *Texas v. Gonzales, supra,* the Ninth and Tenth Circuits held that an intrustion into a Constitutionally protected area to obtain probable cause for the issuance of a search warrant was prohibited by the Fourth Amendment of the Constitution of the United States.

It is significant that the Court of Appeals in its opinion stated "It is a bit disquieting that we must countenance federal snooping around farmers' barns as a legitimate investigative technique." The petitioners contend that the Court of Appeals felt that *Hester v. United States, supra,* demanded such a holding. In the first instance in Hester, the federal agents saw an illegial liquor vessell in the hands of a person. In this case the officers intentionally went to a place within the curtilage of the petitioner's for the specific purpose of obtaining probable cause evidence.

The Fourth Amendment to the Constitution of the United States was never intended to protect or give countenance to any acts on the part of the federal government. It was intended to protect individuals from the federal Governments intrusions upon them.

These cases are important not only to the petitioners, but to the civil liberties to every citizen of the United States to protect them from "federal snooping," within

areas that are constitutionally protected from such intrusions.

The petitioners respectfully submit that the ATF agents, without a warrant, went upon a Constitutionally protected area of each of the petitioners in order to obtain probable cause facts to justify the issuance of a search warrant and that said intrusion is probhibited by the Fourth Amendment of the Constitution of the United States and constituted a warrantless search without probable cause within itself.

The petitioners most respectfully submits that this Petition be allowed and that the acts on the part of the ATF officers be held to be unlawful and that the evidence obtained by the said ATF officers be supressed.

Respectfully submitted,

_____

_____

Attorneys for Petitioners
906 B Street Rear
North Wilkesboro, N.C. 28659
Telephone (919) 667-1111

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1631

United States of America,

Appellee,

versus

William Clyde Brown,

Appellant.

No. 73-1632

United States of America,

Appellee,

versus

Hill Eugene Jones,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued October 1, 1973 Decided November 16, 1973

Before Haynsworth, Chief Circuit Judge, and Bryan, Senior Circuit Judge, and Craven, Circuit Judge.

John E. Hall (McElwee and Hall on brief) for Appellants in Nos. 73-1631 and 73-1632, N. Carlton Tilley, Jr., Assistant United States Attorney, (William L. Osteen, United States Attorney, on brief) for Appellee in Nos. 73-1631 and 73-1632.

PER CURIAM:

Appellants Brown and Jones were convicted of possession of non-tax-paid spirits; each appeals,[1] alleging that his motion to suppress evidence seized by Alcohol, Tobacco and Firearms Division officers, acting with a warrant, should have been granted The gist of appellants' contentions is that in order to obtain facts sufficient to constitute probable cause for the issuance of the search warrant, the ATF officers went to the very place which they sought to search under the authority of the warrant. The first "search" without a warrant was illegal, they argue, because within a constitutionally protected area (the curtilage); therefore the evidence later seized under a search warrant, which depended upon the evidence uncovered in the prior illegal search for its

[1]Brown and Jones appeal from separate trials involving incidents occurring at different times and places; however, the cases are so factually similar that they were argued together before the panel and are treated together in this opinion.

validity, must be suppressed as the "fruit" of an illegal search. Because we believe there was no "search" in the first instance, we affirm the judgments of the district court.

In each instance ATF agents entered upon the premises of appellants, walked to within a few feet of their barns,[2] detected the odor of fermenting mash or fruit and then proceeded to the magistrate to obtain a search warrant. While we agree that the barns in question are part of the curtilage, *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955), we cannot agree, at least so long as the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1925) (holding that a trespass does not of itself, constitute an illegal search) is permitted to stand, that there has been a "search" in violation of the fourth amendment. The ATF officer in neither instance entered into the barn itself, nor attempted to look inside, to confirm his suspicions. *See Taylor v. United States*, 286 U.S. 1, 76 L.Ed. 951 (1931); *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955); *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964). In *Taylor* the Supreme Court stated:

> Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties against unreasonable search.

286 U.S. at 6. *See also Johnson v. United States*, 333 U.S. 10 (1948).

It is a bit disquieting that we must countenance federal snooping around farmers' barns as a legitimate

[2]Brown's barn was sixty-three yards from his house. The agent advanced to within ten yards of the barn, at which point he detected the odor of fermenting apples coming from the barn.

Jones' barn was located some two hundred yards from his dwelling. The officer in this instance walked to within two or three feet of the barn, from which he not only smelled the distinctive odor of moonshine whiskey but also observed a plastic hose and electric wire coming from underground and leading into the barn's interior.

investigative technique. There must surely be a better way than *Hester*-type trespass, but it is not readily discerned in light of the strict standards for the issuance of search warrants set out in *Aquilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

Where there is no entry upon a constitutionally protected area, there can be no "search" within the meaning of the fourth amendment. Appellants' reasonable expectations of privacy--while extending to their dwellings and the immediate area around them and even to the area occupied by outbuildings such as the barns in question, 25 C.J.S. 84–cannot, in light of *Hester*, be said to include the "open fields" around the barn. The words "persons, houses, papers and effects" do not insulate the air around appellants' barns from the peculiar odor of fermenting fruit stored within.

Affirmed.